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Recent Developments: Needle v. White, Mindel, Clark & Hill: Trial Court's Decision to Sanction Reversed as Clearly Erroneous

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to apply the antitrust laws 'prudently and with sensitivity,' with a 'special solicitude for the First Amendment rights' of [the SCTLA]." *Id.* (quoting *Superior Court Trial Lawyers Ass'n. v. F.T.C.*, 856 F.2d at 233-34). Thus, the court of appeals shifted the burden to the FTC to show that the boycotters possessed sufficient market power to warrant a per se violation of the antitrust laws.

The Supreme Court, however, found the court of appeals' analysis to have been critically flawed in two respects. First, the court of appeals exaggerated the significance of the expressive component in the SCTLA's boycott. The Court found nothing unique about the expressive component of the SCTLA boycott. Rather, a rule that would require the courts to apply the antitrust laws with prudence and sensitivity whenever a boycott had an expressive component "would create a gaping hole in the fabric of those laws." *Id.* at 780.

Second, the Court found that the court of appeals was incorrect in their assessment of the antitrust laws. *Id.* at 779. The Court criticized the court of appeals' assumption that the per se rule against price-fixing and boycotts "is only a rule of 'administrative convenience and efficiency,' and not a statutory command." *Id.* at 780. While the Court conceded that the per se rules of liability were in part justified by administrative convenience, the per se rules "reflect a long-standing judgment that the prohibited practices by their nature have a 'substantial potential for impact on competition.'" *Id.* (quoting *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)). As Justice Douglas stated in a footnote to *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), "whatever economic justifications particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *F.T.C.* 110 S. Ct. at 781-82 (quoting Socony-Vacuum, 310 U.S. at 225-26 .

The Court also conceded that some boycotts and some price-fixing agreements were more injurious to competition than others, but held that the court of appeals' assumption that absent proof of market power the SCTLA boycott was harmless, was inconsistent with the course of the Supreme Court's antitrust jurisprudence. *Id.* at 782. Here, there was sufficient testimony to demonstrate that the boycott produced a crisis in the District's criminal justice system which achieved the SCTLA's economic goal. Thus, the Supreme Court reversed the court of appeals' decision creating an exception to the per se rules of antitrust liability. *Id.*

The impact of this decision is substantial. Previously, the notion of a boycott had been an agreement among the participants to refrain from engaging in certain activities in order to bring about a change. It was thought that this type of agreement was protected by the first amendment because it was a form of expression. Now, if such an agreement has the objective of bringing about an economic benefit to the participants, the courts must characterize the agreement as a restraint of trade. The courts are then required to apply the per se rules of antitrust liability to the agreement and find it violative of both the Sherman Act and the Federal Trade Commission Act.

—Thomas J. S. Waxter, III

Needle v. White, Mindel, Clark & Hill: TRIAL COURT'S DECISION TO SANCTION REVERSED AS CLEARLY ERRONEOUS

In *Needle v. White, Mindel, Clarke & Hill*, 81 Md. App. 463, 568 A.2d 856 (1990), the Court of Special Appeals of Maryland held that the trial court's decision to impose over $143,000 in sanctions, pursuant to Maryland Rule 1-341, was clearly erroneous. After reviewing all the evidence in the underlying suit, the court held that neither of the plaintiff's attorneys, nor their client, lacked the substantial justification required to bring suit, nor had they brought the suit in bad faith. An attorney need only bring forth a colorable claim to avoid the imposition of sanctions, while a court cannot use the benefit of hindsight to determine the claim's merits.

After a thirteen-year term of employment, Carolyn Gerst was amicably terminated from her position as a bookkeeper for the law firm of White, Mindel, Clarke and Hill. According to the firm, Gerst was discharged simply because a replacement could do a better job. Yet her employers subsequently discovered, among other discrepancies, that approximately $203,000 had been withdrawn from one of the firm's accounts, coinciding with Gerst's final year of employment. Thus, the firm instructed John Foley, a member of the firm, to file a claim for reimbursement with the insurance company with whom they maintained a $100,000 employee fidelity policy. The claim asserted that the loss resulted from dishonest or fraudulent acts by Gerst. Additionally, a complaint against Gerst was filed with the police, satisfying a condition of recovery under the policy. The full $100,000 was eventually remitted to the firm, while Gerst was charged with embezzlement.

At her criminal trial, Gerst alleged that she withdrew the cash at the request of Samuel Hill, a partner in the firm, and then turned the money over to him. This conflicted with Hill's testimony that withdrawals from the account were allowed by internal paper transfer only, and denied ever authorizing cash withdrawals or receiving any cash from Gerst. After a three-day jury trial, Gerst was acquitted.

Thereafter, Gerst retained Howard J. Needle and Sarah C. King for an initial counsel fee, with additional fees on a contingency fee basis. A suit was subsequently initiated against White, Mindel, Clarke and Hill, as well as Hill and Foley personally, for, ultimately, malicious prosecution and intentional infliction of emotional distress. At the extensive hearing on the defendant's pre-trial motion for summary judgment, Gerst asserted that the initiation of criminal charges by the firm was motivated solely by the firm's efforts to collect on its employee fidelity insurance policy, and resulted in her emotional distress. Conversely, the defendants argued that Gerst instituted her civil action as retaliation for the criminal charges filed against her. The motion was denied.

The case proceeded to trial where the issues were whether the law firm instituted a criminal proceeding against Gerst without probable cause for a purpose other than bringing an offender to justice, and whether, as a result, Gerst suffered emotional distress. *Needle*, 81 Md. App. 467, 568 A.2d at 858. Conflicting testimony was heard on the procedure of cash withdrawals and the ultimate destination of the funds in question. Defendants renewed their motion for summary judgment at the close of Gerst's case and again at the conclusion of all the evidence. The trial court denied the former and reserved ruling on the latter.

The issues, including whether Gerst stole money from the defendants, were submitted to the jury. The jury decided that the defendants had a reasonable belief that Gerst took the money and that they did not report the matter to the police with ill will or with a reckless disregard for the truth. Additionally, the jury found that Gerst suffered emotional distress due to the filing of the police report, but that it was not severe, and that Gerst did *not* steal the money. *Id.* at 468, 568 A.2d at 858. Thus, a judgment was entered for the defendants.

Immediately following the verdict, the court, *sua sponte*, scheduled a sanctions hearing on the issue of Maryland Rule 1-341, Bad Faith - Unjustified Proceedings. *Id.* Although having only allowed three business days in between, the court denied Gerst, Needle and King's request for additional time to prepare and seek separate counsel. Needle and King appeared at the hearing representing both themselves and Gerst.

After conducting post-trial factfinding, the trial judge imposed monetary sanctions of $121,369.14 upon Gerst and $21,748.00 upon Needle and King to be paid to the defendants. *Id.* at 465, 568 A.2d at 857. In a 21-page Memorandum Opinion, the trial court stated that:

> [T]he court is clearly convinced that this suit was brought by the plaintiff because of her ill will and hostility toward [the defendants]. Further, that she felt that she had nothing to lose by bringing this suit but believed that if she were successful she could reap a windfall from the defendants. This court finds as a fact that this suit was brought and continued in bad faith and without substantial justification. The plaintiff knew that this action was frivolous. In addition, this court is clearly convinced that at the very latest, when the case was called for trial on September 6, 1988, the plaintiff's attorneys knew that there was no evidence to support the plaintiff's allegations. Further, they knew or reasonably should have known that there was no justification in continuing this litigation and causing the defendants to incur additional defense costs.

Id. at 469, 568 A.2d at 859. On appeal, the Court of Special Appeals of Maryland limited its review to a single issue - whether the trial court's decision was clearly erroneous. *Id.* at 470, 568 A.2d at 859.

The court began its analysis by discussing the objectives and dangers of Maryland Rule 1-341. The rule allows a trial court to impose sanctions for conduct in bad faith or without substantial justification whether by maintaining or defending a proceeding. The offending party, the advising attorney, or both may be required to pay the adverse party's costs of the proceeding and any reasonable attorney's fees incurred. The objective: eliminating litigant or counsel abuses of the judicial process by initiating or continuing meritless claims. The dangers: the chilling effect on all the parties concerned, as well as limiting free access to the courts, for colorable claims, without fear of penalty over and above defeat. *Id.* at 470, 568 A.2d at 859-60.

The court noted that since the rule's adoption in 1984, it had been used frequently, and in 1988 alone, had been addressed at the appellate level at least six different times. Of those cases, sanctions were upheld only once where fraud was clearly established, and once for lack of substantial justification where the arguments asserted had been repeatedly rejected in previous cases. *Id.* at 471, 568 A.2d at 860.

The court then turned to Needle and King and the issue of substantial justification grounded in questions of client credibility. The court noted that both attorneys testified that they believed in Gerst's protestations of innocence. "A subjective belief in one's client," the court stated, "standing alone, should not be a bar to the imposition of sanctions. Where that belief is supported by articulated facts supporting the subjective opinion, however, the rule is otherwise." *Id.* at 473, 568 A.2d at 861. Moreover, the rule "does not and was never intended . . . to require an attorney to pass judgment on the credibility of his client under the threat of monetary sanction in the event that either a jury or judge arrives at a different conclusion as to credibility." *Id.*

Rather, the test in Maryland for whether substantial justification is established is whether "the legal position taken by counsel is 'fairly debatable,'" and not "whether a court or jury later believes that the client lacks credibility." *Id.* (citing *Newman v. Reilly*, 314 Md. 364, 550 A.2d 959 (1988); ABA Section of Litigation, *Sanctions* (2d Ed. 1988)). The federal courts, the court noted, adopted an even more stringent, objective standard where if the attorney could not form a reasonable belief as to the validity of what is asserted at trial, sanctions would be imposed. *Id.*

After reviewing the information available to the two attorneys, the conflicting testimony, and Gerst's acquittal, the court disagreed with the trial court's belief that no supporting evidence existed as to their client's credibility. Rather, the court held that "by either an articulated subjective belief or by a more rigorous objective standard, Needle and King could not reasonably be held to have proceeded without substantial justification." *Id.*

Next, the court considered the trial court's charge of bad faith on the part of Needle and King in proceeding to trial. The court noted that although Maryland had yet to define bad faith in terms of Rule 1-341, the Supreme Court had previously defined the term as actions maintained "vexatiously, wantonly or for oppressive reasons." *Id.* (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)). Cases addressing the issue in Maryland seemed to indicate that only "egregious behavior" would support such a holding. *Id.* at 474, 568 A.2d at 861. Thus, the court held that in order to impose sanctions based upon bad faith, "clear evidence that the action [was] entirely without color and taken for other improper purposes amounting to bad faith" was required, and that was not the case here. *Id.*

The court then turned to the issue of the Gerst sanctions which the trial court imposed, making no distinction between her actions and those of her counsel's. *Id.* As for whether substantial justification existed, the court again turned to the "fairly debatable" test and stated that it was "an attorney's call" involving "analysis of the legal arguments, theories of recovery, and other decisions requiring the expertise of trained professionals." *Id.* Thus, the court held that judicial review of the issue should focus on the actions of attorneys rather than their clients. *Id.*

The court found that the charge of bad faith was the primary basis for sanctioning Gerst in that the trial court believed that Gerst felt she had "nothing to lose" in bringing the action, but might instead "reap a windfall from the defendants." *Id.* at 474-75, 568 A.2d at 862. Furthermore, the trial court found that she had not sufficiently proven either claim. *Id.* at 475, 568 A.2d at 862. Yet the court of special appeals found that based on the evidence and conflicting testimony, a prima facie case was raised for both malicious prosecution and intentional infliction of emotional distress. Thus, the court concluded that whether the elements were proven was for a jury to decide. *Id.*

Finally, the court addressed the trial court's role when determining sanctions and focused first on the use of judicial hindsight. Relying on cases which reversed decisions to sanction, the court stated that in Maryland, judicial hindsight may not be used to determine whether substantial justification exists. *Id.* at 476, 568 A.2d 862-63. Moreover, a trial attorney should not be required to act as a trier of fact or judge, but need only have a "reasonable basis for believing that a case will generate a factual issue for the fact-finder at trial." *Id.* at 476, 568 A.2d 863. This reasoning was directly in line with the general principle that one need only assert a colorable claim to avoid the imposition of sanctions; an attorney must either make a good faith argument on the merits of the action, or support it by a good faith argument for an extension, modification, or reversal of existing law. *Id.* at 477, 568 A.2d at 863.

In the instant case, the trial court had constructively denied appellees' motion for judgment three times, establishing that it had thrice recognized the existence of disputed questions of fact. It was only after a verdict was returned that the trial court "exercising its perceived power to engage in judicial hindsight, stated that it should never have permitted the case to continue and *sua sponte* embarked on the sanctions phase of the trial." *Id.* at 478, 568 A.2d at 863.

Although the court conceded that justified sanctions could be imposed for conduct during the trial, such as dilatory tactics or abusive conduct, no such allegations were ever made. *Id.* at 479, 568 A.2d at 864. Accordingly, the court held that because the evidence was sufficiently debatable to deny motions throughout the trial, it was sufficient to justify Gerst in bringing and continuing her case. *Id.* Thus, the court of special appeals concluded that the trial court's decision was clearly erroneous. *Id.* at 479-80, 568 A.2d at 864.

In so ruling, the Court of Special Appeals of Maryland once again clearly discouraged the excessive use of Rule 1-341 sanctions. Such use can only impose a chilling effect on a plaintiff's right to court access, while providing an uncertain environment for attorneys to act. As the court opined, Rule 1-341 should only be used in the most extreme of instances when a claim is clearly meritless and intended to remedy only intentional misconduct.

—Vasiliki Papaioannou

***Pavelic & LeFlore v. Marvel Entertainment Group:* SANCTIONS FOR VIOLATION OF FEDERAL RULE OF CIVIL PROCEDURE 11 ONLY APPLY TO THE INDIVIDUAL SIGNER**

In *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989), the United States Supreme Court held that sanctions provided by Federal Rule of Civil Procedure 11 ("Rule 11") only applied to the attorney who signed a paper in violation of Rule 11, even if the attorney explicitly signed on behalf of his firm.

On behalf of Northern J. Calloway, attorney Ray L. LeFlore brought a willful copyright infringment claim in the United States District Court for the Southern District of New York against Marvel Entertainment Group ("Marvel"). In an amended complaint, Calloway alleged that Marvel forged his signature. After initiation of the claim, LeFlore formed the law partnership of Pavelic & LeFlore with Radovan Pavelic. Several papers relying on the allegation of forgery were signed:

"Pavelic & LeFlore
By /s/ Ray L. LeFlore
(A Member of the Firm)
Attorneys for Plaintiff."

Id. at 457. The district court found that these papers were in violation of Rule 11 and imposed a sanction in the amount of $100,000 against Pavelic & LeFlore. Upon a motion by Radovan Pavelic, the district court shifted half of the sanction from the firm to LeFlore, because the firm did not exist during the major part of the litigation. However, the district court rejected Pavelic's contention that Rule 11 only empowered the court to impose the sanction upon LeFlore and not upon the firm. The Court of Appeals for the Second Circuit affirmed the sanction. The Second Circuit's decision directly conflicted with a Fifth Circuit holding that authorized Rule 11 sanctions against only the individual signers. *Id.* at 458 citing *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1128-30 (1987)).

Pavelic appealed to the United States Supreme Court and was granted certiorari. In an opinion by Justice Scalia, the Court agreed with the Fifth Circuit and reversed the Second Circuit. In interpreting Rule 11, the Court relied on the plain meaning of the rule. *Pavelic & LeFlore*, 110 S. Ct. at 458 (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980)).

Where a pleading, motion, or other paper violates Rule 11, the rule requires the trial court to "impose upon the person who signed it . . . an appropriate sanction." *Id.* The Court noted that if viewed in isolation, the phrase "person who signed" is ambiguous. *Id.* However, upon reading the phrase in the entire context of Rule 11, the Court reasoned that since Rule 11 begins "with a requirement of individual signature, and then proceed[s] to discuss the import and consequences of signature, . . . references to the signature in the later portions must reasonably be thought to connote the individual signer mentioned at the outset." *Id.*

In rejecting Marvel's contention that the legal principles of partnership and agency should apply, the Court emphasized that Rule 11 established a duty that an attorney could not delegate. *Id.* at 459. The Court also held that although LeFlore explicitly signed on behalf of his firm, the sanction only applied to LeFlore individually. The Court reasoned that a signature on behalf of a firm could not comply with the first sentence of Rule 11, since it requires papers to be signed "by at least one attorney of record in the attorney's individual name." *Id.* The Court noted that in the past, the preferred practice for an attorney was to sign on his own behalf with the name of his firm beneath. *Id.* (citing Gavit, *The New Federal Rules and State Procedure*, 25 A.B.A.J. 367, 371 (1939)).

Although a law firm may have more funds than an individual signer, the Court noted that the purpose of the sanction was punishment rather than reimbursement. The Court also noted that the function "of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility." *Id.* at 460. Moreover, the Supreme Court determined that holding an individual signer personally liable provides a greater economic deterrent. *Id.*

In a lone dissent, Justice Marshall argued that Rule 11 sanctions can apply to a law firm. At first, the rule uses the term "signer," but later in its discussion of sanctions, the rule uses the phrase "the person who signed." *Id.* at 461 (Marshall, J., dissenting). The dissent noted that in the context of the Federal Rules of Civil Procedure, one could reasonably assume that the drafters meant the term "person" to include partnerships and professional corporations. *Id.* (Marshall, J., dissenting) (citing 5 U.S.C. § 551 (2); N.Y. Partnership Law § 2 (McKinney 1988)). Recognizing that the sanction should be tailored to each situation, Justice Marshall opined that Rule 11 allowed the trial judge to decide whether sanctions would more properly be applied to the attorney or his law firm. *Id.* at 462 (Marshall, J., dissenting). Justice Marshall reasoned that individual accountability may be heightened if an attorney's negligence also subjected his law firm to liability. *Id.* at 461-62 (Marshall, J., dissenting).

In holding that Rule 11 sanctions apply only to the attorney who signs a paper in violation of the rule, the United States Supreme Court precluded the application of Rule 11 sanctions to law firms. As a result, parties may find it more difficult to collect reimbursement for expenses caused by Rule 11 violations, but personal liability may provide a greater incentive for attorneys to comply with Rule 11.

—Richard E. Guida

***Simpler v. State:* POLICE MAY NOT FRISK A SUSPECT AS A MATTER OF ROUTINE CAUTION, THERE MUST BE A REASONABLE SUSPICION THAT THE SUSPECT IS ARMED AND DANGEROUS**

In *Simpler v. State*, 318 Md. 311, 568 A.2d 22 (1990) the Court of Appeals of Maryland held the seizure of paraphernalia with marijuana residue was unconstitutional where the suspect was frisked without reasonable suspicion that he was armed and dangerous.

On the evening of May 8, 1987, Sergeant Wassmer (Wassmer), of the Cecil County Sheriff's Department, and a young explorer scout were on routine